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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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No. 807

SUN PUBLISHING COMPANY,

*Petitioner,*

*v.*

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE  
AND HOUR DIVISION, UNITED STATES DEPARTMENT OF  
LABOR,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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*To the Honorable the Chief Justice and the Associate Jus-  
tices of the Supreme Court of the United States:*

The Sun Publishing Company respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a decree of said court entered on January 24, 1944 (R. 651), modifying and enforcing as modified an order of the District Court of the United States for the Western District of Tennessee, entered October 30, 1942, in a proceeding brought by the Administrator of the Wage and Hour Division, United

States Department of Labor, to enjoin petitioner from violating Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201 et seq.) (R. 632-634).

The opinion of the District Court is reported in 47 F. Supp. 180-192. The opinion of the Circuit Court of Appeals (R. 652-659) is as yet unreported.

#### A.

#### **Statement of the Matter Involved.**

On March 15, 1941, respondent herein, who is the Administrator of the Wage and Hour Division, United States Department of Labor, brought a proceeding in the District Court of the United States for the Western District of Tennessee to enjoin petitioner from violating Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201 et seq.).

Petitioner, the Sun Publishing Company, is a corporation organized and existing by virtue of the laws in the State of Tennessee, maintaining its principal place of business in the city of Jackson, County of Madison, where it is engaged in the printing and publishing of a newspaper and the operation of a radio broadcasting station. The radio operations of petitioner are not involved in this proceeding.

Petitioner's newspaper, The Jackson Sun, is published weekday evenings, Monday through Friday, and on Sunday mornings. The Jackson Sun in 1941 had a daily circulation of approximately 9,000 and a Sunday circulation of approximately 11,000, of which approximately all but 200 copies, daily and Sunday, were distributed in the State of Tennessee (R. 621). Petitioner obtained from outside



of Tennessee news reports, feature matter, advertising copy, newsprint and ink, all of which went into the production of its papers in its plant in Jackson.

Fourteen weekly newspapers exempt from the Act in controversy are published in the vicinity of Jackson (R. 621-622) and are directly competitive with petitioner's newspaper (R. 38).

Prior to the filing of the bill of complaint agents of the respondent had made inspections of petitioner's records in December 1939 and again in December 1940. Following the first inspection demand was made upon petitioner that it pay back overtime wages to some 21 employees whom the inspector alleged to have worked in excess of the maximum hours provided for in Section 7 of the Act without being compensated in accordance with the provisions of that section for their overtime. Petitioner requested the detail of the demand from respondent's agent but this was refused. The record is devoid of any evidence that any employee at any time, either prior to or after the filing of the bill of complaint, made any claim upon petitioner for back overtime under the statute.

Following the December 1939 inspection, all employees of petitioner except the heads of departments who were classified as executives were notified that they were on a 40-hour week basis; that no overtime would be permitted unless ordered by their executives; and that no salaries would be paid until and unless the employees entitled to them turned in time slips for the salary weeks indicating the number of hours, day by day, worked therein. The record is undisputed that while the employees turned in such time slips they made no effort to keep any accurate account of their hours of work.

In his bill of complaint the Administrator alleged that petitioner had failed to pay certain of its employees the minimum wages prescribed in Section 6 of the Act; that

petitioner had failed to pay certain other of its employees overtime in accordance with the requirements of Section 7 of the Act; that petitioner had failed to keep its records in accordance with Section 11 (c) of the Act and that petitioner had knowingly falsified its records to indicate compliance with the provisions of Sections 6 and 7 of the Act.

In the District Court petitioner moved to dismiss the action on the ground, *inter alia*, that the court lacked jurisdiction since the Act as applied to petitioner's newspaper publishing business was unconstitutional and void. This motion was overruled but without prejudice to renew at the trial. The motion was renewed during trial and again overruled.

In its answer petitioner, in addition to denying the jurisdiction of the court, affirmatively defended on the ground that the attempted application of the Act to its business as a publisher of a daily newspaper violated its rights as guaranteed by the First Amendment to the Constitution of the United States and constituted an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the Fifth Amendment to the Constitution (R. 60-62). Petitioner also denied that it was engaged in commerce or in producing goods for commerce within the Act; asserted a defense under Section 13 (a) (2) thereof; and attacked the regulations promulgated by respondent under Section 13 (a) (1) of the Act as arbitrary and capricious in their application to its employees.

The case came on to be heard before Judge Marion S. Boyd in the District Court at Jackson on September 15, 1942. Respondent presented fifteen witnesses during the trial and petitioner presented five. A stipulation between the parties as to the nature of petitioner's newspaper publishing business was entered into, received by the court and made a part of the record (R. 449-459).

On October 30, 1942, the District Court entered its order enjoining petitioner from violating Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Act (R. 632-634). The District Court specifically found that there had been no falsification of records. By the terms of its order, however, petitioner was enjoined from sending its newspapers to subscribers residing outside of the State of Tennessee.

Petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit. Argument on its appeal was heard on November 30, 1943, in Cincinnati, Ohio.

On January 24, 1944, the Circuit Court of Appeals amended Paragraph 3 of the District Court's order which provides:

"The defendant shall not, contrary to section 15 (a) (1) of the Act, ship, deliver, transport, offer for transportation, or sell in interstate commerce, as defined by the Act, or ship, deliver, or sell with knowledge that shipment, delivery, or sale thereof in interstate commerce is intended, any goods in the production of which any employee of the defendant has been employed at rates of pay less than those specified in paragraphs (1) and (2) of this judgment" (R. 633-634).

by adding the following:

"Provided that nothing herein shall prevent or prohibit the defendant from shipping, delivering, transporting, or offering for transportation or sale its newspapers in interstate commerce or otherwise" (R. 651).

In all other respects, it affirmed the order of the District Court.

B.

### **Jurisdiction.**

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925 (43 Stat. 938; 28 U. S. C., Sec. 347 (a)). The decree of the United States Circuit Court of Appeals to be reviewed was entered on January 24, 1944 (R. 651).

### C.

#### **Constitutional, Statutory and Regulatory Provisions Involved.**

The constitutional provisions involved are Article I, Section 8, Clause 3, of the Constitution of the United States and the First and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Appendix, page 33.

The statutory provisions involved are those embraced in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201 et seq.). The statute is set forth in the Appendix, pages 35-47.

The regulatory provisions involved are the regulations of the Administrator of the Wage and Hour Act, promulgated under the authority granted in Section 13 (a) (1) of the Act. These regulations are set forth in the Appendix, pages 49-55.

### D.

#### **Questions Presented.**

1. Whether Congress, in the light of the prohibition in the First Amendment against the abridgment of the freedom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of petitioner.

2. Whether, in view of the provisions of the First and Fifth Amendments, Congress has the power to regulate the business of the press by classifying the press on the basis of volume of circulation, frequency of issue and area of dis-

tribution in such a manner as to exempt more than 72 per cent of the total number of newspapers from the burdens of the Act, while subjecting all others engaged in the same business to those burdens.

3. Whether Congress has the power under the commerce clause of the Constitution to apply the Act to petitioner's newspaper publishing business.

4. Whether Sections 6 and 7 of the Act can be applied to petitioner's newspaper publishing business in view of the provisions of Section 13 (a) (2) which exempts employees of a service establishment the greater part of whose servicing is in intrastate commerce.

5. Whether the definitions of "employees employed in a bona fide executive \* \* \* professional \* \* \* capacity" as promulgated by the Administrator and applied to the newspaper publishing business are void because arbitrary, capricious and unreasonable in nature.

6. Whether, where the record demonstrates that employees deliberately violated specific instructions to perform their work within the statutory period and turned in false and inaccurate time slips to show compliance with said instructions, the Administrator can obtain an injunction to restrain the employer from violating the record-keeping provisions of the Act based on findings of the lower court giving credence to the employee's testimony as to overtime, thereby shifting the responsibility for their overtime to their employer.

E.

### **Reasons Relied On for the Allowance of the Writ.**

1. *The decree constitutes a particular form of abridgment of the constitutional guaranty of a free press not heretofore reviewed by this Court.*

There is here presented to this Court for the first time the question as to whether, in a regulatory law applying to only certain businesses and industries in the United States and in turn only to certain types of employees within those businesses and industries of the United States, Congress, notwithstanding the prohibition of the First Amendment, has power under Article I, Section 8, Clause 3 of the Constitution to regulate the business of the press on the basis of volume of circulation, frequency of issue and area of distribution in such a manner as to impose its regulatory burdens upon less than 28 per cent of all the newspapers in the United States of which petitioner's newspaper is one while exempting all others from those burdens. The decision of the Circuit Court of Appeals disregards the limitation upon the exercise of the commerce power contained in the First Amendment. Also it is in conflict with numerous decisions of this Court holding that the press cannot be burdened in such a manner as here attempted.

*2. The holding that application of Sections 6 and 7 of the Act to petitioner's business does not constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution is in conflict with the principles announced by this Court in Grosjean v. American Press Co., 297 U. S. 233 (1936).*

The decision of the Circuit Court of Appeals, upholding as it does the classification of the press on the basis of volume of circulation, frequency of issue and area of distribution, violates the rights of petitioner as guaranteed by the First and Fifth Amendments to the Constitution of the United States. It is in conflict with the decision of this Court in *Grosjean v. American Press Co.*, *supra*, which unanimously held that a legislature cannot classify the

press on the basis of volume of circulation for purposes of taxation.

3. *The holding that the Fair Labor Standards Act is applicable to petitioner's business is in conflict with decisions of this Court under the Act and with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in Schroeffer v. A. S. Abell Co., 138 F. (2d) 111, (Certiorari denied January 17, 1944).*

The decision of the Circuit Court of Appeals is in conflict with the holdings of this Court that the business of printing, preparing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. It is also in conflict with decisions of this Court in controversies involving the application of the Act herein. Likewise it is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the recent *Schroeffer* case, where certiorari was denied by this Court.

4. *The question whether petitioner's business is exempt from the application of the Act under Section 13 (a) (2) is an important one in the administration of the Act and should be decided by this Court.*

The decision of the Circuit Court of Appeals is in conflict with decisions of this Court holding that the business of gathering and disseminating information is essentially one of service to the public. It is also in conflict with the most recent pronouncement of this Court to the effect that freedom of the press is in a preferred position as against all other types of business by reason of the guaranty in the First Amendment.

5. *The definitions of "employees employed in a bona fide executive \* \* \* professional \* \* \* capac-*

*ity'' as promulgated by the Administrator and applied to the newspaper publishing business are arbitrary, capricious and unreasonable and should be reviewed by this Court.*

The decision of the Circuit Court of Appeals upholding the regulations promulgated by the Administrator defining "employees employed in a bona fide executive \* \* \* professional \* \* \* capacity" is not based upon the record in this case, upon custom or practice in the newspaper publishing business in respect of executive employees, or upon the historical concept of professional employment.

*6. The holding by the Circuit Court of Appeals that petitioner is responsible for the failure of its employees to carry out its instructions in respect of hours to be worked and reports to be made thereon is in conflict with the decisions of numerous other courts, has not heretofore been presented to this Court, and should be determined by this Court.*

The Circuit Court of Appeals held that, notwithstanding petitioner had instructed its employees not to work overtime except when ordered to do so by their executive superiors and further had required each employee to fill out a signed time slip indicating his hours of labor, day by day, for each payroll week, petitioner was responsible for the failure of its employees to carry out its instructions and was liable for overtime pay for hours claimed to have been worked in violation of instructions and not reported on the time slips. This holding is in conflict with numerous decisions of other courts but the question itself has never been presented to this Court for final determination.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Court of Appeals



enforcing with modifications the decree of the District Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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March 18, 1944.